

----- In the Matter of -----)

MOKULEIA WATER, LLC and)

MOKULEIA WATER USERS ASSOCIATION))

Notice of Failure to Comply With)

the Commission's Laws and Rules;)

Order to Show Cause Why)

Respondents Should Not be)

Assessed a Civil Penalty.)

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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ORDER NO. 22857

Filed Sept. 15, 2006
At 12 o'clock P.M.

Karen Hirst.
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Commissioner, State of Hawaii
K. H. H. H. H.

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By Decision and Order No. 22214, issued on January 11, 2006, the commission found Mokuleia Water to be a public utility, as defined by Hawaii Revised Statutes ("HRS") § 269-1, and determined that the transfer of its water distribution system to MOKULEIA WATER USERS ASSOCIATION was void, pursuant to HRS § 269-19. Decision and Order No. 22214 further required Mokuleia Water to apply for a certificate of public convenience

and necessity ("CPCN") to provide water service to its customers, pursuant to HRS § 269-7.5, within 120 days of the filing of Decision and Order No. 22214. In addition, if Mokuleia Water's sole member, Metropolitan Mortgage & Securities Co., Inc. ("Metropolitan"), intended to sell its membership in or the assets of Mokuleia Water, the commission required the filing of an application for approval to transfer such membership in or assets of Mokuleia Water, pursuant to HRS § 269-19.¹

B.

Motion for Reconsideration

On January 20, 2006, Mokuleia Water filed a motion for reconsideration of Decision and Order No. 22214 ("Motion for Reconsideration"), pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-41 and 6-61-137.² On January 25, 2006, MOKULEIA BEACH COLONY ("Beach Colony") filed a memorandum in opposition to Mokuleia Water's Motion for Reconsideration, pursuant to HAR §§ 6-61-41 and 6-61-140.³

¹Decision and Order No. 22214 at 19.

²Motion for Reconsideration, Modification, and/or Vacation of Decision and Order No. 22214; Memorandum in Support of Motion; Declaration of Stephen D. Tom; Exhibit "A" & "B"; and Certificate of Service, filed on January 20, 2006 ("Motion for Reconsideration").

³Memorandum in Opposition to Mokuleia Water LLC's Motion for Reconsideration, Modification, and/or Vacation of Decision and Order No. 22214 filed on January 20, 2006, and Certificate of Service, filed on January 25, 2006.

C.

Motion for Stay

On January 26, 2006, Mokuleia Water filed a motion for stay of Decision and Order No. 22214, pursuant to HAR § 6-61-138.⁴ The Beach Colony opposed Mokuleia Water's motion for stay on January 30, 2006, arguing that Mokuleia Water provided no basis for the stay of Decision and Order No. 22214.⁵

On February 10, 2006, Mokuleia Water asked the commission not to act on its Motion for Reconsideration for a period of sixty days, to allow time for the parties to engage in discussions with the Board of Water Supply ("BWS").⁶ On February 13, 2006, the Beach Colony wrote to request that the commission "disregard Stephen Tom's letter dated February 10, 2006," since his "statement that a settlement involving the [BWS] may be possible is without merit."⁷ Mokuleia Water renewed its request to have the commission delay ruling on its Motion for

⁴Motion for Stay of Decision and Order No. 22214 and Certificate of Service, filed on January 26, 2006. The motion for stay filed on January 26, 2006, consisted of one paragraph, and was not supported by a memorandum. Mokuleia Water concedes that its January 26, 2006 motion for stay "does not necessarily comply with the commission's applicable rules and regulations," and states that it intends its June 15, 2006 motion for stay to supersede its January 26, 2006 motion in its entirety. Motion for Stay, filed on June 15, 2006, at 2.

⁵Memorandum in Opposition to Mokuleia Water LLC's Motion for Stay of Decision and Order No. 22214 filed on January 26, 2006, and Certificate of Service, filed on January 30, 2006.

⁶Letter from Stephen D. Tom, Esq., White & Tom, counsel for Mokuleia Water (Feb. 10, 2006).

⁷Letter from Michael W. Gibson, Esq., Ashford & Wriston, counsel for Beach Colony (Feb. 13, 2006).

Reconsideration on February 20, 2006.⁸ On May 15, 2006, the commission requested that the parties confirm that they still desired a delay of the commission's decision on Mokuleia Water's Motion for Reconsideration.⁹

In response to the commission's letter, on May 23, 2006, Mokuleia Water filed an application for interim stay of Decision and Order No. 22214, in which it stated that Metropolitan, Mokuleia Water's sole member, had filed an application with the commission in Docket No. 2006-0137, requesting to transfer the assets or interest in Mokuleia Water to North Shore Water Company, LLC ("NSWC").

On June 15, 2006, Mokuleia Water filed another motion for stay of Decision and Order No. 22214, pursuant to HAR § 6-61-41, requesting that the commission stay, for a period of twenty-four months, the requirement of Decision and Order No. 22214 that Mokuleia Water apply for a CPCN within 120 days of Decision and Order No. 22214.¹⁰ According to

⁸Letter from Stephen D. Tom, Esq., White & Tom, counsel for Mokuleia Water (Feb. 20, 2006).

⁹Letter to Stephen D. Tom, Esq., Marie E. Riley, Esq., Owen H. Matsunaga, Esq., and Michael W. Gibson, Esq. (May 15, 2006).

¹⁰Motion for Stay of Decision and Order No. 22214; Memorandum in Support; Exhibits 1 and 2; Verification and Certificate of Service, filed on June 15, 2006 ("Motion for Stay"). Mokuleia Water does not request a hearing on its motion. Mokuleia Water served copies of its Motion for Stay upon the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs, Michael Gibson, Esq., counsel for the Beach Colony, and Owen Matsunaga, Esq., counsel for Mokuleia Water Users Association.

Mokuleia Water, it seeks this "extraordinary measure and relief" from the commission in light of the pending sale of the membership interests in or the assets of Mokuleia Water to NSWC and the recent closing of the purchase by Dillingham Ranch Aina LLC, the sole member of NSWC, of the former Dillingham Ranch lands.¹¹ Mokuleia Water asserts that Dillingham Ranch Aina and NSWC have committed to work with all interested parties to have the BWS extend its current water main along Farrington Highway approximately 2,800 feet to a master meter, thereby eliminating the need for Mokuleia Water to continue serving the existing water users in Mokuleia in the future.

Mokuleia Water also contends that its users "recognize the advantages of receiving potable water service from BWS."¹² Accordingly, Mokuleia Water has engaged in extensive discussions with BWS to examine various alternatives to provide a long-term solution to its customers.¹³

¹¹Motion for Stay, filed on June 15, 2006, at 1.

¹²Motion for Stay, filed on June 15, 2006, at 3.

¹³The BWS articulated several conditions for the provision of water service, including: (a) that a community association be established comprised of all water users who would receive water; (b) an inventory of all "fixture units" to be served by the water system be submitted to the BWS; (c) the association pay a Water Systems Facilities Charge based on the "fixture unit" count for the development, transmission and daily storage for all users; (d) the association pay the monthly BWS water bill; (e) a 12-inch water main be extended from the end of the BWS water system to a BWS master meter; and (f) if BWS requires, that any new construction on the association's side of the master meter comport with BWS Water System Standards for domestic service and fire protection.

Mokuleia Water states that NSWC will participate with the BWS and the community association in planning, funding, and implementing the line extension along Farrington Highway. Mokuleia Water estimates that it will take approximately twenty-four months to complete the engineering, planning, and installation of the line extension.

In addition, Mokuleia Water has offered to provide the commission with quarterly written reports on the progress and status of forming a community association and its ongoing negotiations with the BWS, as well as other relevant information the commission may require.

On July 5, 2006, the Beach Colony filed a memorandum in opposition to Mokuleia Water's June 15, 2006 Motion for Stay.¹⁴ The Beach Colony opposes the June 15, 2006 Motion for Stay because it finds "serious problems with the proposal" to sell the interest or assets of Mokuleia Water to NSWC. In particular, the Beach Colony argues that the proposed sale to NSWC involves only a portion of the whole water system.¹⁵ The Beach Colony also argues that it is premature to assume that the BWS will approve of the proposal to connect the existing system.

On July 26, 2006, a petition signed by forty-nine residents of Mokuleia was submitted to the commission, urging the

¹⁴Mokuleia Beach Colony's Memo in Opposition to Motion for Stay of Decision and Order No. 22214 Filed on 06/15/06 and Certificate of Service, filed on July 5, 2006 ("Beach Colony's Opposition").

¹⁵Beach Colony's Opposition at 2.

stay of the Decision and Order No. 22214 requirement that Mokuleia Water obtain a CPCN. Instead, the petitioners request time for the interested parties to pursue a solution involving the BWS.

By this Order, the commission addresses Mokuleia Water's Motion for Stay, filed on June 15, 2006, which supersedes its motion for stay filed on January 26, 2006, and supplements and, where appropriate, supersedes its application for interim stay of Decision and Order No. 22214, but does not render a decision on Mokuleia Water's Motion for Reconsideration.

II.

Discussion

HAR § 6-61-138 provides that the filing of a motion for reconsideration or rehearing does not stay a commission decision and order. It further provides, however, that if a stay is granted, it shall remain in effect until disposal of the motion for reconsideration. HAR § 6-61-138.

Pending before the commission are Mokuleia Water's Motion for Reconsideration and Motion for Stay. In its Motion for Stay, Mokuleia Water argues that its sole member, Metropolitan, recently completed a Chapter 11 bankruptcy proceeding, and that the bankruptcy of its sole member left it with no assets to viably operate a public utility. Since Mokuleia Water would have no funds after May 31, 2006, to pay the costs of running a water system, Metropolitan entered

into an agreement with NSWC to manage the water operations on an interim basis.

As a result, Mokuleia Water argues that the long-term solution for water service rests with the BWS and not in a privately owned public utility, and therefore, NSWC's resources would be better spent towards the BWS line extension and not commission certification. NSWC intends to apply the resources that would normally be required to meet the requirements of public utility regulation toward the costs of achieving the BWS line extension. Mokuleia Water and NSWC, moreover, have committed to charging Mokuleia Water's water users the standard BWS rates during the duration of the stay. Motion for Stay at 6.

While the proposal to connect to the BWS water system is not novel, the current momentum demonstrated and interest expressed by those in the area and NSWC appear likely to drive the proposal to completion. The costs associated with compliance as a regulated utility - for certification and completion of rate cases - are significant. NSWC's belief, then, that its resources could be directed at either certification or toward system upgrade to comply with BWS standards, but not both, likely is well founded. In addition, from a ratepayer perspective, the rates that would be charged by a public utility may well be in excess of those charged by the BWS given the small number of ratepayers among whom utility expenses can be distributed. The Beach Colony's concerns relating to the sale of the interest in or assets of Mokuleia Water are the subject of a pending

docket before the commission, Docket No. 2006-0137, and will be thoroughly examined therein.

Having reviewed the record, the commission finds it in the public interest to grant Mokuleia Water's Motion for Stay for a period of twenty-four months to allow it, NSWC, and other interested stakeholders in the Mokuleia area to work with the BWS toward developing a system capable of connection to the BWS water system. This stay is conditioned, however, on Mokuleia Water (or NSWC, if the application for sale is approved in Docket No. 2006-0137), on charging ratepayers no more than standard BWS rates as committed to by Mokuleia Water, and providing the commission and the Division of Consumer Advocacy with quarterly updates as to the progress of forming a community association, its negotiations with BWS, its progress toward line extension or improvement, its assessments of the quality and reliability of water service provided, rates being charged to ratepayers, and any other information that may be required by the commission or its staff in writing. Such quarterly reports shall begin three months after the filing of this Order.

III.

Orders

THE COMMISSION ORDERS:

1. Mokuleia Water's Motion for Stay, filed on June 15, 2006, is granted.

2. This docket is stayed for a period of twenty-four months, pending the parties' negotiations with the BWS for provision of water service to Mokuleia Water's service area; This stay is conditioned, however, on Mokuleia Water (or NSWC, if the application for sale is approved in Docket No. 2006-0137), on charging ratepayers no more than standard BWS rates as committed to by Mokuleia Water, and providing the commission and the Division of Consumer Advocacy with quarterly updates as to the progress of forming a community association, its negotiations with BWS, its progress toward line extension or improvement, its assessments of the quality and reliability of water service provided, rates being charged to ratepayers, and any other information that may be required by the commission or its staff in writing.

3. The commission, at its discretion, upon its own initiative or motion, reserves the right to lift the stay at any time, should circumstances warrant them in the interest of protecting the ratepayers or the general public.

4. The failure to adhere to the commission's order shall constitute cause for the commission to void this Order, and may result in further regulatory action as authorized by law.

DONE at Honolulu, Hawaii SEP 15 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Catherine P. Awakuni
Catherine P. Awakuni
Commission Counsel

2006-0009.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22857 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: SEP 15 2006